

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review. In addition, the parties stipulated into evidence a computer printout regarding dates of payment of benefits.

ISSUES

The Administrative Law Judge found claimant entitled to permanent partial general body disability benefits based upon a twenty (20%) percent work disability. The Administrative Law Judge afforded greater weight to loss of ability to earn a comparable wage because claimant had a history of intermittent work. The claimant requests the Appeals Board to review the finding of the nature and extent of disability and requests additional weeks of temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

(1) For the reasons expressed below, claimant is entitled to receive benefits based upon a thirty-three (33%) percent permanent partial general disability as a result of her work-related injury of October 23, 1989.

Because of claimant's history of working in temporary jobs for intermittent periods, the Administrative Law Judge held that greater weight should be given to claimant's loss of ability to earn a comparable wage than claimant's loss of ability to return to the open labor market. The Appeals Board disagrees with that conclusion. Although it is true that claimant did only work intermittently after graduating from high school in 1980, this is insufficient reason to disregard or to give little weight to claimant's loss of ability to perform work in the open labor market where the record is silent regarding claimant's state of mind concerning future employment.

Claimant is thirty-one (31) years old and the mother of two elementary school children, ages eleven (11) and eight (8). After high school, claimant married and traveled with her husband who was enlisted in the US Navy. During her husband's four-year tour of duty, claimant traveled with him to various locations, and at one location, worked for a period of several months at the base PX. Claimant testified she did not, nor desired to, work full time before her two children entered school. Over the last several years, claimant worked several jobs through a temporary agency and provided regular baby-sitting services for friends and relatives. Claimant began working for the respondent in August of 1989, unaware whether her job would be terminated after seasonal Christmas sales or become permanent. After recovering from the four surgeries to her hands and wrists she received as a result of this accident, claimant applied for work with several potential employers, but remains unemployed.

At her attorney's request, Lynn D. Ketchum, M.D., evaluated the injuries sustained to claimant's upper extremities as a result of her work-related injury. After twice seeing claimant, Dr. Ketchum believes claimant has sustained a ten percent (10%) permanent impairment of function to each upper extremity which converts to twelve percent (12%) permanent impairment of function to the body as whole as a result of claimant's bilateral carpal tunnel and bilateral de Quervain's syndromes and the multiple, related surgeries.

The doctor also believes claimant should perform no repetitive gripping with either hand and avoid lifting weights greater than ten (10) pounds. As Dr. Ketchum was the only physician to testify, his medical opinions are uncontroverted. Dr. Ketchum is credible as he is a board-certified plastic surgeon and ninety-seven percent (97%) of his practice is related to surgery to the hand and upper extremities.

Claimant was evaluated by two vocational rehabilitation experts. The first, Monty Longacre, testified claimant, as a result of her work-related injuries, experienced a twenty-five percent (25%) loss of her ability to earn a comparable wage and a sixty percent (60%) loss of her ability to perform work in the open labor market. Mr. Longacre evaluated claimant at her attorney's request. The second vocational rehabilitation expert, Gary Weimholt, evaluated the claimant at respondent's request. Mr. Weimholt testified claimant lost eight to sixteen percent (8-16%) of her ability to earn a comparable wage and forty to sixty percent (40-60%) of her ability to perform work in the open labor market as a result of her injuries. Based upon the opinions of the expert witnesses, the Appeals Board finds that claimant has, as a result of the injuries she sustained while working for the respondent, lost in the range of eight to twenty-five percent (8-25%) of her ability to earn a comparable wage and forty to sixty percent (40-60%) of her ability to perform work in the open labor market.

Although the Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage, there is no compelling reason in this case to give either factor a greater weight. Therefore, the Appeals Board averages both losses and finds claimant has sustained a thirty-three percent (33%) permanent partial general disability in accordance with K.S.A. 1989 Supp. 44-510e. This statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

(2) Claimant requests the Appeals Board find her entitled to additional dates of temporary total disability benefits. The evidence fails to support this request. Claimant's evidence fails to establish the inclusive dates during which additional temporary total is claimed, and, likewise, fails to prove claimant was temporarily and totally disabled for the period in question. Claimant testified that during the period after her first surgery until released by Dr. Wood after her fourth surgery, she was unable to perform her job with respondent. However, no evidence was provided to determine whether claimant was able to perform other jobs she performed in the past or to determine the medical status of claimant for the period in question. The report prepared by Mr. Weimholt refers to several releases from three different physicians which indicate claimant may or may not have been able to work during the period in question.

Claimant bears the burden of proof to establish her claim. Burden of proof is defined in K.S.A. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

". . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

Based on the record as a whole, the claimant has failed to prove that it is more probably true than not that she is entitled to additional temporary total disability benefits. Therefore, claimant's request for same must be denied.

(3) The Appeals Board adopts the findings and conclusions set forth by the Administrative Law Judge in his Award dated June 8, 1994, that are not inconsistent with those expressed herein.

AWARD

Wherefore, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated June 8, 1994, shall be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Melanie Cunningham, and against the respondent, House of Lloyds, and its insurance carrier, Safety Mutual Casualty Corporation, for an accidental injury which occurred October 23, 1989 and based upon an average weekly wage of \$240.00, for 46.57 weeks of temporary total disability compensation at the rate of \$160.01 per week or \$7,451.67, followed by \$368.43 weeks at the rate of \$52.80 per week or \$19,453.10 for a 33% permanent partial general disability, making a total award of \$26,904.77.

As of February 17, 1995, there is due and owing claimant 46.57 weeks of temporary total disability compensation at the rate of \$160.01 per week or \$7,451.67, followed by 231.14 weeks of permanent partial disability compensation at the rate of \$52.80 per week in the sum of \$12,204.19, for a total of \$19,655.86 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$7,248.91 is to be paid for 137.29 weeks at the rate of \$52.80 per week, until fully paid or further order of the Director.

The orders of the Administrative Law Judge that are not inconsistent with the above are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: J. Paul Maurin III, Kansas City, KS
Randall W. Schroer, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
George Gomez, Director